Petition

81-1831

Supreme Court, U.S.
FILED
APR 5 1982
ALEXANDER L. STEVAS
CLERK

NO. _____

IN THE SUPREME COURT OF THE
UNITED STATES

OCTOBER TERM, 1981

STATE OF ALABAMA,

PETITIONER

VS.

LULA MAE McCURLEY,

RESPONDENT

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF ALABAMA

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ATTORNEYS FOR PETITIONERS

QUESTIONS PRESENTED

I. UNDER THE UNITED STATES CONSTITUTION, MAY THE LEGISLATIVE BRANCH OF A GOVERNMENT PRESCRIBE HOW CLAIMS MAY BE MADE AGAINST THE GOVERNMENT?

II. UNDER THE UNITED STATES CONSTITUTION, MAY A STATE LEGISLATURE PRESCRIBE HOW CLAIMS MAY BE MADE AGAINST THE STATE?

PARTIES

In the Circuit Court of Mobile County, Alabama, the Court of Criminal Appeals of Alabama and the Supreme Court of Alabama, the parties were: The State of Alabama, Petitioner herein and Lula Mae McCurley, Respondent herein.

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OPINIONS BELOW

The opinion of the Court of Criminal Appeals of Alabama is not as yet reported but will be reported as:

State v. McCurley (Cr. App. Ala., 1981) ____ So. 2d ____.

The same is submitted herewith as Appendix "A", hereto.

The opinion and order of the Supreme Court of Alabama are not as yet reported but will be reported as:

Ex parte: McCurley, In Re: State v. McCurley (S. Ct. Ala., 1982) ____ So. 2d ____.

The same are submitted herewith as Appendix "B".

JURISDICTION

The order of the Supreme Court of Alabama denying rehearing was issued February 5, 1982, and this petition is filed within sixty (60) days of said date:

The jurisdiction of this Honorable Court is invoked under 28 United States Code, Section 1257.

CONSTITUTIONAL PROVISIONS INVOLVED

Section One of the Fourteenth Amendment to the Constitution of the United States which reads as follows:

> "...All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny any person within its jurisdiction the equal protection of the laws..."

Also relevant to this case is Section 14 of the Alabama Constitution, which reads as follows:

> "That the State of Alabama shall never be made a defendant in any Court of law or equity."

STATUTORY PROVISIONS INVOLVED

There are no statutory provisions directly at issue in this case, but the following statutes are relevant in that they provide legislatively authorized remedies by which claimants such as the Respondent herein can recover moneys from the State of Alabama:

Title 15, Section 15-22-36(d), Code of Alabama, 1975.

Title 41, Sections 41-9-60 and 62 (a)(7), Code of Alabama, 1975.

These provisions are submitted as Appendix "C" hereto.

STATEMENT OF THE CASE

I.

SUMMARY

From the time this litigation was instituted in the Circuit Court of Mobile County Alabama, through the rehearing procedure in the Alabama Supreme Court,

no one ever questioned that Respondent McCurley had a valid claim against the Petitioner State. The sole issue was always whether she could by-pass the legislatively ordained remedies and present her claim in a non-jury habeas corpus action in the circuit court. The Supreme Court of Alabama ultimately held that she not only had the right to by-pass the statutory remedies but that she had the right to do so under the Due Process Clause of the Federal Constitution.

II.

STATEMENT

On September 21, 1978, McCurley pleaded guilty to selling Talwin in the Circuit Court of Mobile County, was convicted, placed on probation and fined $5,000.00. (R. pp. 1-3).

Subsequently, in an unrelated case involving another conviction of McCurley

for selling Talwin, the Supreme Court of Alabama ruled that Talwin had not been properly placed on the list of controlled substances by the State Board of Health at its August 15, 1973, meeting. McCurley v. State, (S. Ct. Ala., 1980) 390 So. 2d 25.[1]

The instant proceedings were instituted by McCurley on November 17, 1980, as a habeas corpus action demanding that her 1978 conviction be set aside and that a Judgment for the fine and costs paid by her in 1978 be rendered against the State. The Circuit Court ruled in McCurley's favor on both points and rendered Judgment against the State of

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[1] On March 23, 1982, the Court of Criminal Appeals of Alabama held that at a subsequent meeting on December 18, 1974, the substance was properly added to the list. Zeigler v. State (Crim. App. Ala., 3-23-82) ___ So. 2d _____.

Alabama for $5,000.00 plus costs. (R. p. 1-12-a).

The State appealed to the Court of Criminal Appeals of Alabama which affirmed the setting aside of the conviction but reversed the Judgment of the Circuit Court to the extent that it rendered a money Judgment against the State. The basis of the reversal was Section 14 of the State Constitution. The Court of Appeals ruled that McCurley's relief lay in the Board of Adjustment. State v. McCurley (Crim. App. Ala., March 17, 1981) ____ So. 2d ____, Mns. Op. pp. 3ff., Appendix "A", Page 7.

On Certiorari, the Supreme Court of Alabama on January 8, 1982, reversed and remanded, holding that due process and equal protection under the Constitution required that McCurley

be permitted to recover these damages in a habeas corpus action. Ex parte: McCurley (S. Ct. Ala., 1982) ____ So. 2d ____, Appendix "B"

The State applied for rehearing pointing out among other things that the State Supreme Court's opinion was in obvious conflict with the numerous decisions of this Honorable Court holding that the power rests in the Legislature to determine how claims could be made against a government. The State's application was overruled on February 5, 1982. (Appendix "B")

SUMMARY OF THE ARGUMENT

In deciding this case on the basis of Federal and other cases from other jurisdictions which were in turn based on the Federal Constitution, the Alabama Supreme Court ruled on a point of Federal Constitutional Law.

In a line of cases starting in 1858

and continuing to the present day, this Honorable Court has held that the legislature may decide how claims are to be made against the government e.g. Beers v. Arkansas, 20 How. 527, 209 U.S. 527, 15 L. Ed. 991 (1858) and United States v. Mitchell, 445 U.S. 535, 63 L. Ed. 2d 607, 100 S. Ct. 1349 (1980).

Cases by lower courts have in many instances simply rejected the rule of this Honorable Court and held that the recovery of such claims was constitutionally compelled. See, for example, United States v. Lewis ([E. D. La., 1972] 342 F. Supp. 833) in which the District Court expressly rejected the decision of this Honorable Court in United States v. Gettinger (272 U.S. 734, 71 L. Ed. 499, 47 S. Ct. 276 [1927]), "...[b]ecause of the cursory opinion rendered in Gettinger and the [United States Supreme] Court's reliance on con-

tractional principles...." (342 F. Supp. 833, 836). In the instant case the Supreme Court of Alabama relied heavily on United States v. Lewis, supra. Because of this patent conflict between the decisions of this Honorable Court and those of the lower courts, the writ ought issue.

ARGUMENT

I.

THIS PETITION PRESENTS A FEDERAL CONSTITUIONAL QUESTION

What is at issue in this case is the manner in which a party may bring a claim against a state. There might be a be a tendency to dismiss this matter as simply a question of state procedural law but to do so would be to ignore the U.S. Constitutional basis of the Supreme Court of Alabama's decision.

Section 14 of the Alabama Consti-

tution unequivocally bars law suits against the State. As late as 1971, the Alabama Supreme Court held that Section 14 not only barred suits against the State but that the Legislature has no power to authorize such suits and no state official has authority to waive sovereign immunity. Aland v. Graham, 287 Ala. 226, 250 So. 2d 677 (1971)[2]. It was against this background that the Court of Criminal Appeals reversed the money Judgment rendered against the State.

The Alabama Supreme Court in reversing the Court of Criminal Appeals referred to Section 14 of the State Con-

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2 "...[T]his Court has held that Sec. 14 'wholly withdraws from the Legislature, or any other state authority, the power to give consent to a suit against the State, Dunn Construction Co. v. State Board of Adjustment, 234 Ala. 372, 175 So. 383, and no individual has authority to waive this immunity. State Tax Commission v. Commercial Realty Co., 236 Ala. 358, 182 So. 31...." (250 So. 2d 677, 681).

stitution only in a quotation from the Court of Criminal Appeals opinion. At no other point in its opinion did the Supreme Court of Alabama make any reference at all to Section 14 of the State Constitution nor any other Alabama Statute or case. The State Supreme Court's decision rests squarely on three cases, one a Federal case ruling on a point of Federal Law (United States v. Lewis [E.D.La. 1972] 342 F. Supp. 833, aff'd [5th Cir., 1973] 478 F. 2d 835) and two cases from other states holding that the prohibition against the taking of property without due process of law bars the government from defining how claims may be made against it.[3]

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[3]"...The Fifth Amendment prohibition against the taking of one's property without due process of law demands no less than the full restitution [...in an ordinary civil action...] of a fine that was levied pursuant to a conviction based on an unconstitutional law...." United States v. Lewis, 342 Supp. 833 quoted with approval by the Supreme Court of Alabama at p. 3 (Appendix "B", p. 11).

The fact that the Alabama Supreme Court ignored State law in favor of that of other jurisdictions, clearly demonstrates that this case was decided under the Federal Constitution and not State law.

II.

THE DOCTRINE OF SOVEREIGN IMMUNITY

At the very foundation of the issues of this case is the question of the Constitutionality of sovereign immunity or, more particularly the right under sovereign immunity of the Legislature to define how claims against the government may be made.

Sovereign immunity is a basic and ancient principle of our law. See 72 Am. Jur. 2d, State, Territories and Dependencies, Section 99. The doctrine of sovereign immunity for the United States has been recognized by this Court

Court many, many times. See, for example, United States v. Clarke, 8 Pet. 436, 444, 33 U.S. 436, 444, 8 L. Ed. 1001, 1004 (1834).

For many years there has been Legislative action toward waiving sovereign immunity. However, this power has been universally recognized as being in the Legislature. In United States v. Shaw (309 U.S. 495, 84 L. Ed. 888, 60 S. Ct. 659 [1939]), Justice Reed discussed Federal sovereign immunity and its waiver in these words:

> "...as a foundation for the examination of...[the]...question...[of whether a certain claim against the Federal Government could be maintained]...we lay the postulate that without specific statutory consent, no suit may be brought against the United States...No officer by his action can confer jurisdiction. Even when suits are authorized they must be brought only in designated courts...The reasons for this immunity are imbedded in our legal philosophy. They partake somewhat of dignity and decorum, somewhat of practical administration, somewhat of the political desirability of an impregnable legal

> citadel where government as distinct from its functionaries may operate undisturbed by the demands of litigants. A sense of justice has brought a progressive relaxation by legislative enactments of the rigor of the immunity rule. As representative governments attempt to ameliorate inequalities as necessities will permit, prerogatives of the government yield to the needs of the citizen...It is not our right to extend the waiver of sovereign immunity more broadly than has been directed by the Congress..." (309 U.S. 495, 500-502, 84 L. Ed. 888, 891-892).

This Honorable Court has consistantly held that suits against the Federal Government could be maintained only in those cases provided for by Congress and that these must be brought and maintained in accordance with statutory requirements. Minnesota v. United States, 305 U.S. 382, 83 L. Ed. 235, 59 S. Ct. 292 (1938)[4]; United States v. New York Rayon

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4 "...But Congress has provided generally for suits against the United States in Federal Courts. And it rests with Congress to determine not only whether the United States may be sued, but in what courts the suit may be brought..." (305 U.S. 382, 388, 83 L.Ed. 235, 241).

Importing Co., 329 U.S. 663, 658-659, 91 L.Ed. 577, 581-582, 67 S. Ct. 601 (1947); United States v. Trestan, 424 U.S. 392, 47 L. Ed. 2d 114, 96 S. Ct. 948 (1976)[5]; United States v. Mitchell, 445 U.S. 535, 63 L.Ed. 2d 607, 100 S. Ct. 1349 (1980)[6].

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5 "...It long has been established, of course, that the United States, as sovereign, is immune from suit save as it consents to be sued...and the terms of its consent to be sued in any court define that court's jurisdiction to entertain the suit...." (424 U.S. 392, 394, 47 L.Ed. 2d 114, 121).

6 "...It is elementary that '[t]he United States as sovereign, is immune from suit save as it consents to be sued..., and the terms of its consent to be sued in any court define that court's jurisdiction to entertain suit.' United States v. Sherwood, 312 U.S. 584, 586, 85 L.Ed. 1058, 61 S. Ct. 767 (1941). A waiver of sovereign immunity 'cannot be implied but must be unequivocally expressed.' United States v. King, 395 U.S. 1, 4, 23 L.Ed. 2d 52, 89 S.Ct. 1501 (1969). In the absence of clear congressional consent, then, 'there is no jurisdiction in the Court of Claims more than in any other court to entertain suits against the United States.' United States v. Sherwood, supra, at 535, 538, 63 L.Ed. 2d 607, 613)."

This Honorable Court has applied this same principle to the States. When the legislature consents to suits against the State, it may limit the causes, the amount of recovery and prescribe the procedures. Nothing in the Federal Constitution inhibits the legislature's authority in this reguard. For example, in Beers v. Arkansas (20 How. 527, 20 U.S. 527, 15 L.Ed. 991 [1858] this Honorable Court wrote:

> "...It is an established principle of jurisprudence in all civilized nations that the sovereign cannot be sued in its own courts, or in any other, without its consent and permission; but it may, if it thinks proper, waive this privilege, and permit itself to be made a defendant in a suit by individuals, or by another State. And as this permission is altogether voluntary on the part of the sovereignty, it follows that it may prescribe the terms and conditions on which it consents to be sued, and the manner in which the suit shall be conducted, and may withdraw its consent whenever it may suppose that justice

to the public requires it...." (20 U.S. 527, 529, 15 L.Ed. 2d 991, 992).

More recently in Great Northern Life Insurance Co. v. Read (322 U.S. 47, 88 L.Ed. 1121, 64 S. Ct. 873 [1944], this Honorable Court wrote:

> "The principle of immunity from litigation assures the states and the nation from unanticipated intervention in the processes of government, while its rigors are mitigated by a sense of justice which has continually expanded by consent the suability of the sovereign. The history of sovereign immunity and the practical necessity of unfettered freedom for government from crippling interferences require a restriction of suability to the terms of the consent, as to persons, courts and procedures...." (322 U.S. 47, 53-54, 88 L.Ed. 1121, 1126).

See also Smith v. Reeves (178 U.S. 436, 441f, 44 L.Ed. 1140, 1143ff, 20 S. Ct. 919 [1900] and Murray v. Wilson Distilling Co. (213 U.S. 151, 53 L.Ed. 742, 29 S.Ct. 458 [1908]).

This is no sterile procedural point.

The question of allowing or not allowing suits against the Government has many, many pros and cons. On the side of disallowing such suits is the matter of protecting the government's sovereign dignity, its freedom of action and the public purse; on the side of allowing such suits are such considerations as protecting the government's credit and the government's need to do justice. The question is, therefore, one of policy based on a balancing of paradoxical considerations. All of these considerations can be met to one extent or another, if the remedy is fashioned with care. In recognizing that this policy decision must be made by the legislatures, this Honor able Court placed it ultimately in the hands of the people themselves.

It cannot be said that the legislatures have been derelict in addressing

this problem. The Alabama Legislature has provided a remedy for every sort of claim or complaint that could be made, including claims based on "...law, justice or good morals...." Title 41, Section 41-9-60, Code of Alabama, 1975, Appendix "C". For the sort of claim raised by Respondent McCurley the Alabama Legislature provided not one but two different remedies. See Appendix "C".

III.

REASON FOR GRANTING THE WRIT: CONFLICT WITH THE PRIOR DECISIONS OF THIS HONORABLE COURT ON A U. S. CONSTITUTIONAL ISSUE

There is probably no area of the law where the lower courts has so flagrantly disregarded the teachings of this Honorable Court than the one at issue in this case, and nothing demonstrates this more clearly than the lower courts' treatment of this Honorable Court's decision in United States v. Gettinger (272 U.S. 734,

71 L.Ed. 499, 47 S.Ct. 276 [1927]).

Gettinger had entered a plea of nolo contendere to a charge under a certain Federal Statute. With the consent of the United States District Attorney and the Court, the plea was conditioned on Gettinger's right to recover the amount of the fine in the event the Statute was declared unconsititutional. Now, the obvious purpose of this condition was to avoid the effect of sovereign immunity which would bar recovery of the fine even if it later appeared that the Statute was void. Subsequently the Statute was indeed declared unconstitutional, and Gettinger attempted to recover the fine based on his conditional plea. This Honorable Court refused to allow Gettinger to recover the fine, writing:

> "...The attempt by plaintiffs in error to reserve rights if the Lever Act should be held unconstitutional amounted at most to a protest, possibly sufficient to

> overcome the suggestion of an estoppel, but no contract arose out of it which obligated the United States to return the fine. Neither the court nor any federal officer had authority to make such an agreement. The controlling general pricniples are sufficiently stated in Russell v. United States, 182 U.S. 516, 530, 45 L.Ed. 1210, 1215, 21 Sup. Ct. Rep. 899[7]; United States v. Nederlandsch-Amerikaansche Stoomvart Maatschappij, 254 U.S. 148, 65 L.Ed. 193, 41 Sup. Ct. Rep. 72; United States v. Minnesota Mut. Invest. Co. 271 U.S. 212, 70 L. Ed. 911, 46 Sup. Ct. Rep. 501...." (272 U.S. 734, 735, 71 L.Ed. 499, 500-501).

Thus, Gettinger stands for the proposition that sovereign immunity cannot be avoided by a conditional plea.

Now let's see what the lower courts

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7 "...If the United States was a person, on the facts of this record (assuming, of course, the petition to be true), it could be sued as upon an implied contract, but it is the prerogative of a sovereign not to be sued at all without its consent or upon such causes of action as it chooses. It has not chosen to be sued in an action sounding in tort this court has declared, as we have seen...." (182 U.S. 516, 535, 45 L.Ed. 1210, 1217).

have done with this Honorable Court's decision in Gettinger.

In United States v. Western Chemical & Mfg. Co. ([S.D.Calf., 1948] 78 F. Supp. 983) the Court set aside a conviction entered under circumstances identical to those in Gettinger, except that the defendant's plea had not been conditioned. On the question of whether the Government could be compelled to return the fine the Court observed: "...This point seems to be conclusively settled by the case of United States v. Gettinger, et al., 272 U.S. 734, 47 S.Ct. 276, 71 L.Ed. 499...." (78 F. Supp. 983). After discussing Gettinger the Court concluded "...This case [Gettinger] would seem conclusive against the defendant's legal position here...." (78 F. Supp. 983, 984). Yet, having recognized that this Honorable Court's decision in Gettinger was controlling,

the District Court proceeded to order: "...That the clerk of this court turn over to the defendant any money which may still be in the registry of the court..." (78 F. Supp. 983, 984). In other words, the Court recognized that Gettinger compelled one result but ordered the opposite result.

In United States v. Lewis ([E.D.La., 1972] 342 F. Supp. 833) the District Court was faced with the same situation as that in Western Chemical & Mfg. Co., supra. Again, the Court was well aware of this Court's opinion in Gettinger, but the Court refused to following Gettinger, "...Because of the cursory opinion rendered in Gettinger and the [United States Supreme] Court's reliance on contractural principles..." (342 F. Supp. 833, 836). The District Court in Lewis followed the District Court's decision in Western Chemical & Mfg. Co., supra,

instead of this Honorable Court's decision in Gettinger.

Lewis is particularly relevant here since the Supreme Court of Alabama relied on it and quoted from it in the instant case.

It is evident that there are now two conflicting rules of constitutional law this subject. One which says that a person whose conviction is set aside has the Constitutional right to recover any fine he paid in the same proceeding. This is the rule of Western Chemical & Mfg. Co., supra; Lewis, supra and the instant case. On the other hand, there is the rule of this Honorable Court holding that the question of if and how such a claim may be made is for Legislative determination. This is the rule of Gettinger, supra, as well as Beers v. Arkansas, 20 How. 527, 20 U.S. 527, 15 L.Ed. 991 (1858). United States v. Shaw,

309 U.S. 495, 84 L.Ed. 888, 60 S. Ct. 659 (1939); Minnesota v. United States, 305 U.S. 382, 83 L. Ed. 235, 59 S.Ct. 292 (1938); Great Northern Life Ins. Co. v. Read, 322 U.S. 47, 88 L.Ed. 1121, 64 S. Ct. 873 (1944); United States v. New York Rayon Importing Co., 329 U.S. 663, 91 L. Ed. 577, 67 S. Ct. 601 (1947); United States v. Trestan, 424 U.S. 392, 47 L.Ed. 2d 114, 96 S. Ct. 948 (1976) and United States v. Mitchell, 445 U.S. 535, 63 L. Ed. 2d 607, 100 S. Ct. 1349 (1980).

If the Constitution is to mean the same thing throughout the land, then one court, this Honorable Court, must be the final binding authority on that meaning. For this reason, this Honorable Court should grant the writ and resolve this gross conflict between its decisions and those of the lower courts.

CONCLUSION

In conclusion, the Petitioner State respectfully submits that the decision and opinion of the Supreme Court of Alabama is in direct conflict with the numerous cases of this Honorable Court holding that Legislatures have authority to determine how claims may be made against a government. For this reason the writ ought issue, and the Petitioner prays that this Honorable Court will issue the writ of certiorari and review the decision and opinion of the Honorable Court of Appeals and on such review will reverse the decision of said Court.

Respectfully submitted,

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ASSISTANT ATTORNEY
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CERTIFICATE OF SERVICE

I, Joseph G. L. Marston, III, an Assistant Attorney General of Alabama, a member of the Bar of the Supreme Court of the United States and one of the Attorneys for the State of Alabama, Petitioner, do hereby certify that on this _____ day of _____, 1982, I did serve the requisite number of copies of the foregoing on the Attorney for Lula Mae McCurley, Respondent, by mailing the same to him, first class postage prepaid and addressed as follows:

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Appendix

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RESPONDENT

APPENDIX

TO THE

PETITION FOR A WRIT OF CERTIORARI
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APPENDIX A

THE STATE OF ALABAMA
JUDICIAL DEPARTMENT

THE ALABAMA COURT OF CRIMINAL APPEALS

OCTOBER TERM, 1981-81

1 Div. 227

State

v

Lula Mae McCurley

Appeal from Mobile Circuit Court

BOOKOUT, JUDGE

On November 17, 1980, the appellee, Lula Mae McCurley, filed a petition for writ of habeas corpus in the Circuit Court of Mobile County. The petition alleges that on September 21, 1978, the appellee had been convicted for selling pentazocine (also known as Talwin), was sentended to five years' imprisonment, which sentence was suspended, and appellee was placed on probation for five

years. A fine of $5,000.00 and court costs in the amount of $307.70 were also assessed against appellee which she paid.

The habeas corpus petition also alleges that appellee is presently awaiting resentencing on a subsequent conviction for possession of controlled substances, and the September 21, 1978, conviction, supra, will be used as a prior conviction (to enhance the punishment) if not set aside. Appellee alleges that such prior conviction is null and void because pentazocine (Talwin) was held to have been added to the controlled substance list in an unconstitutional manner per Ex parte McCurley, Ala., 390 So. 2d 25 (1980).

After due return to the writ was made, a hearing was held thereon, and the trial court issued the writ thereby (1) vacating the prior conviction and (2) ordering that the fine and court costs

be repaid to the appellee. The State has appealed to this court challenging the authority of the trial court to grant the above relief.

I

Generally, the writ of habeas corpus is not available to persons not in custody such as on parole, on bail, or where the sentence is prospective only. Williams v. State, 42 Ala. App. 140, 155 So. 2d 322 (1963); Shuttlesworth v. State, 42 Ala. App. 34, 151 So. 2d 734 (1962); Magee v. State, 42 Ala. App. 71, 152 So. 2d 443 (1963).

However, a writ of habeas corpus may issue against a judgment which is void on its face for want of jurisdiction. Baker v. State, 268 Ala. 410, 108 So. 2d 361 (1959); Hable v. State, 41 Ala. App. 389, 132 So. 2d 201 (1961). Habeas corpus will lie where the invalidity of the

prior court judgment shows on its face some fundamental illegality. Thomas v. State, 40 Ala. App. 697, 122 So. 2d 535 (1960). If the Invalidity of a judgment does not show on the face of the record proper (the indictment, judgment, etc.), but must be established by parol testimony, habeas corpus will not lie, but instead the common writ of error coram nobis is the remedy. Wiman v. Argo, 308 F. 2d 674 (5th Cir. 1962), cert. denied, 371 U.S. 933, 83 S. Ct. 306, 9 L. Ed. 2d 270.

In the instant case the prior record proper discloses that the petitioner was convicted for the "Sale of Pentazocine." The Supreme Court of Alabama has held that pentazocine (Talwin) was not properly classified as a controlled substance by the State Board of Health and cannot constitute the basis for a criminal charge. Ex parte McCurley,

supra.

No parol testimony was necessary in the instant case to establish the lack of jurisdiction as to the offense in the prior case. The courts of this state take judicial notice of the laws and statutes of the state. Thagard v. Brock, 282 Ala. Ala. 262, 210 So. 2d 821 (1968). Pentazocine (Talwin) was not a controlled substance, and its possession or sale was therefore not illegal. A charge based on the sale of pentazocine was not an offense and was not a charge which would confer criminal jurisdiction upon the circuit court. Therefore, the prior judgment shows on its face a conviction for conduct which does not constitute a public offense and is thus void and subject to challenge by way of a writ of habeas corpus.

II

We find no authority for thr trial

court to order the state to repay to the petitioner the fine and court costs paid in the prior case in question. The order of the trial court amounts to a money judgment against the state and in our opinion violates Article I, § 14, Constitution of Alabama 1901.

Cases set out in annotations to Article I, § 14, supra in Vol. I, Code of Ala. 1975, are legion to the effect that the state's sovereign immunity is virtually complete and almost invincible. Sanders Lead Co. v. Levine, 370 F. Supp. (M.D. Ala. 1973); Hutchinson v. Board of Trustees of Univ. Ala., 288 Ala. 20, 256 So. 2d 281 (1971). Article I, § 14, supra, even prevents actions against the state to obtain refunds of taxes erroneously paid into the state treasury. Haden v. Lee's Mobile Homes, Inc., 41 Ala. App. 376, 136 So. 2d 912 (1961); Raible Co. v. State Tax Commission, 239

Ala. 41, 194 So. 560 (1939).

As suggested in Hutchinson, supra, the only relief available to persons such as the instant petitioner would be a "relief bill" by the legislature or a claim filed with the State Board of Adjustment per § 41-9-60, et seq., Code of Ala. 1975.

The order of the trial court vacating the appellee's prior conviction and sentence in Case No. CC-77-001286 is hereby affirmed; however, the order of the trial court mandating repayment to the appellee of the fine and court costs is reversed and the cause is remanded for judgment consistent with this opinion.

AFFIRMED IN PART; REVERSED AND REMANDED IN PART.

All the Judges concur.

APPENDIX B

JAN 8 1982

THE STATE OF ALABAMA

JUDICIAL DEPARTMENT

THE SUPREME COURT OF ALABAMA

OCTOBER TERM, 1981-82

Ex parte Lula Mae McCurley

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS

(Re: State of Alabama

v.

Lula Mae McCurley)

EMBRY, JUSTICE.

We granted the writ of certiorari directed to the Court of Criminal Appeals to review a question of first impression: whether monies paid as fine and costs imposed after pleas of guilty to criminal charges made pursuant to a statute subsequently determined, retroactively, to be unconstitutional in its application to

defendant, must be refunded?

Petitioner, Lula Mae McCurley, pleaded guilty in 1978 to charges of sale of pentazocine hydrochloride (Talwin) in violation of the Alabama Uniform Controlled Substances Act, Code 1975, §§ 20-2-1, et seq. She received a five year suspended sentence and was ordered to pay a fine in the amount of $5,000 and court costs totalling $307.70, both of which she duly paid.

Subsequently, this court ruled in McCurley v. State, 390 So. 2d 25 (Ala. 1980), that Talwin had not been classified as a controlled substance under the requirements of the Act and we, therefore, reversed McCurley's conviction for its sale. Following that decision, McCurley petitioned the trial court for the writ of habeas corpus to vacate the conviction and sentence. The trial court granted her requested relief and also

ordered that she be repaid the amounts of the fine and court costs, from which judgment the State appealed.

The Court of Criminal Appeals affirmed the trial court's judgment insofar as it vacated the conviction and sentence, but reversed as to the order for the State to repay the fine and court costs, saying:

> "We find no authority for the trial court to order the state to repay to the petitioner the fine and court costs paid in the prior case in question. The order of the trial court amounts to a money judgment against the state and in our opinion violates Article I, § 14, Constitution of Alabama 1901."
>
> ". . . .
>
> ". . . [T]he only relief available to persons such as the instant petitioner would be a 'relief bill' by the legislature or a claim filed with the State Board of Adjustment per § 41-9-60, et seq., Code of Ala. 1975."

We find no Alabama case which had addressed the issue here presented. How-

ever, this very question was considered by the federal district court in United States v. Lewis, 342 F. Supp. 833 (.E.D. La. 1972), aff'd 478 F. 2d 835 (5th Cir. 1973), which declared:

> ". . .While there are no means available to compensate a person who has been imprisoned for violating a statute that is subsequently found constitutionally void and retrospectively applied, there is always a means for such a person to recoup his losses when the loss takes the form of a monetary fine. The Fifth Amendment prohibition against the taking of one's property without due process of law demands no less than the full restitution of a fine that was levied pursuant to a conviction based on an unconstitutional law. Fairness and equity compel this result, and a citizen has the right to expect as much from his government, notwithstanding the fact that the government and the court were proceeding in good faith at the time of prosecution."

In Lewis, the federal government asserted, as does the State here, the defenses of sovereign immunity and availability to petitioner of another remedy. In affirming the lower court's

decision, the Fifth Circuit addressed these issues as follows:

> "This cause would require less in the way of adjudication if the party holding funds exacted under an unconstitutional statute was not an entity which could and does assert sovereignty as justification for its refusal to re store such funds to them from whom they were received.
>
> ". . . .
>
> "The Government concedes, although it has little choice to do otherwise, that the judgments of the district court must be affirmed insofar as they set aside the convictions of Lewis and Willoz. The Government assets that, although the statute under which the fines were imposed [was] in violation of the Constitution, nevertheless if there is to be any recovery, which the Government does not concede, it must be by a separate action brought under the Tucker Act. 28 U.S.C.A. § 1346 (a). This statute is one which confers a jurisdiction upon the district courts. It is not procedural. We can see no reason why a person who has paid a fine pursuant to an unconstitutional statute should be required to resort to a multiplicity of actions in order to obtain reimbursement of money to which he is entitled. Since the district court was empowered to set aside the conviction, it could also

> correct the unlawful result of the conviction and require the repayment of the money collected as fines. . . .
>
> "The Government says that the appellants cannot recover in any event or by any existing remedial procedure because there is no express statutory authority for such relief. Just as the imposition of a fine is an incident of a criminal conviction, so is the direction for repayment an incident to the vacating and setting aside of the conviction."

478 F. 2d at 836.

Reasoning similarly, the Supreme Court of South Dakota in State v. Piekkola, 90 S.D. 335, 241 N.W. 2d 563 (1976), pronounced:

> ". . . Even as the court had the right to set aside Defendant's conviction it had the right and the duty to set aside the resulting sentence, including the fine and court costs imposed. Once the conviction had been set aside the state was without a right to collect or retain the fine and costs and Defendant had a lawful expectation of their return. The refund was incident to the vacation of the judgment in question.
>
> ". . . .

> ". . . To petition for the return of a fine and of costs imposed on the basis of unlawful authority is no more a suit against the state barred by sovereign immunity than to petition or file for the return of m oney paid to the government as income tax in excess of the amount due. To make more of the action than that offends common sense and severely distorts the image of justice as fairness."

And in People v. Meyerowitz, 61 Ill. 2d 200, 335 N.E. 2d 1 (1975), the Supreme Court of Illinois concluded:

> ". . . We are of the opinion that the money, having been received in payment of fines imposed as an incident to judgments of conviction, should be ordered refunded as an incident to the vacation of the judgments under which it was ordered paid."

Our thinking accords with the rationale and holdings of these decisions from other jurisdictions. We therefore conclude the trial court was acting both within its authority, and judiciously, in ordering repayment of the amounts of the fine and court costs to McCurley. Equity and fairness demanded no less.

The judgment of the the Court of Criminal Appeals is due to be reversed and this case is hereby remanded to that court for entry of judgment consistent with this opinion.

REVERSED AND REMANDED.

Torbert, C.J., Maddox, Faulkner, Jones, Almon, Shores, Beatty and Adams, JJ., concur.

* * * * *

FEBRUARY 5, 1982
THE STATE OF ALABAMA--JUDICIAL DEPARTMENT

IN THE SUPREME COURT OF ALABAMA

OCTOBER TERM 1981-82

80-539

Ex Parte: Lula Mae McCurley
PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS

(RE: State of Alabama vs. Lula Mae McCurley

IT IS ORDERED that the application for rehearing filed in the above case on January 20, 1982, be, and the same is hereby, overruled.

NO OPINION."

APPENDIX C

CODE OF ALABAMA, 1975

TITLE 15, CHAPTER 22

PARDONS, PAROLES AND PROBATION

§ 15-22-36. Authority to grant pardons and pardon and paroles and remit fines and forfeitures.

(a) In all cases, except treason and impeachment and cases in which sentence of death is imposed and not commuted, as is provided by law, the board of pardons and paroles shall have the authority and power, after conviction and not otherwise, to grant pardons and paroles and to remit fines and forfeitures.

(b) Each member of the board of pardons and paroles favoring a pardon, parole, remission of a fine or forfeiture or restoration of civil and political rights shall enter in the file his reasons in detail, which entry and the order shall be public records, but all other portions of the file shall be privileged.

(c) No pardon shall relieve one from civil and political disabilities unless specifically expressed in the pardon; and no pardon shall be granted unless the prisoner has successfully completed at least three years of permanent parole or until the expiration of his sentence if his sentence was for less than three years, except upon the unanimous affirmative vote of the board following receipt and filing of clear proof of his innocence of the crime for which he was

convicted and the written approval of the judge who tried his case or district attorney or with the written approval of a circuit judge in the circuit where he was convicted if the judge who tried his case is dead or no longer serving.

(d) The board of pardons and paroles shall have no power to grant a pardon, order a parole, remit a fine or forfeiture or restore civil and political rights until 30 days' written notice that the prisoner is being considered therefor has been given by the board to the judge and the district attorney who tried the subject's case; provided,however, that if they are dead or not serving, such notice shall be given to the district attorney and one of the judges of the circuit in which the subject was convicted. (Acts 1939, No. 275, p. 426; Code 1940, T. 42, § 16; Acts 1951, No. 599, p. 1030.)

* * * *

TITLE 41, CHAPTER 9

ARTICLE 4.

BOARD OF ADJUSTMENT.

§ 41-9-60. Purpose of article.

The purpose of this article is to provide a method of payment by the state of Alabama or any of its agencies, commissions, boards, institutions or departments to persons for injuries to person or property or for death occasioned by the state of Alabama or any of its agencies, commissions, boards, institutions or departments where in law,

justice or good morals the same should be paid. (Acts 1935, No. 546, p. 1164; Code 1940, T. 55, § 344.)

* * *

§ 41-9-62. Claims within jurisdiction of board generally; employees of muncipalities, counties, etc., not within jurisdiction of board, etc.

(a) The board of adjustment shall hve the power and jurisdiction and it shall be its duty to hear and consider:

(1) All claims for damages to the person or property growing out of any injury done to either the person or property by the state of Alabama or any of its agencies, commissions, boards, institutions or departments;

(2) All claims for personal injuries to or the death of any employee of the state of Alabama or any of its agencies, commissions, boards, institutions or departments arising out of the course of his employment or sustained while engaged in the business of the state of Alabama or any of its agencies, commissions, boards, institutions or departments;

(3) All claims for personal injuries to or the death of any convict;

(4) All claims of members of the public at large or of officers of the law arising out of injuries sustatined while attempting to recapture escaped convicts, which convicts have escaped after they have been placed in the

actual custody of the board of corrections;

(5) All claims against the state of Alabama or any of its agencies, commissions, boards, institutions or departments arising out of any contract, express or implied, to which the state of Alabama or any of its agencies, commissions, boards, institutions or departments are parties, where there is claimed a legal or moral obligation resting on the state;

(6) All claims for money overpaid on obligations to the state of Alabama or any of its agencies, commissions, boards, institutions or departments;

(7) All claims for money voluntarily paid to the state of Alabama or any of its agencies, commissions, boards, institutions or departments, where no legal liability existed to make such payment;

(8) All claims for underpayment by the state of Alabama or any of its agencies, commissions, boards, institutions or departments to parties having dealings with the state of Alabama or any of its agencies, commissions, boards, institutions or departments;

(9) All claims for money or property alleged to have wrongfully escheated to the state of Alabama; and

(10) All claims for injury or death of any student duly enrolled in any of the public schools of this state resulting from an accident sustained while being transported to or from school or in connection with any school activity in any bus or any

motor vehicle operated directly by any school board or agency of the state or through contract with another. Awards payable to any such student for injuries sustained in such accident shall be equal to the maximum benefits payable to employees as provided in chapter 5 of Title 25 for injuries, loss of time or medical attendance; and, where death results from such injuries, the amount payable to the parent or parents of such student shall be equal to the maximum amount payable to a totally dependent parent or parents as provided by chapter 5 of Title 25; provided, however, that no payment for death of such student shall be made to any parent or parents unless they were actually supporting such student at the time of the accident causing the injuries and death. The fact that such student has no earning capacity or earns an average wage of less than the amount which would entitle him to maximum benefits under chapter 5 of Title 25 shall in no way limit an award to him, his parent or parents. Awards for such injuries or death shall constitute a prior and preferred claim against moneys appropriated for the minimum program fund, and no part of any such award shall be charged against any funds allotted to the school board of the county or city or the district board of education of the independent school district where said accident occurred. If it should appear to the board of adjustment after investigation that the accident causing the injury or death of such student was caused under circumstances also creating a legal liability for damages on the part of any party and it should further appear to the board of adjustment that claim may be made

against such party by such student, his parent or legal representative to recover damages, then, in that event, any payment otherwise due under this subdivision may be withheld by the board of adjustment pending final settlement of such claim and, if said student or his parent or legal representative recovers damages against said party, andy sum so recovered and collected may be offset against payments due under this subdivision, and the balance due, if any, shall thereafter be promptly paid by the board of adjustment. The provisions of this subdivision shall apply to all claims relating to injuries to school children fi led with said board within one year of the date of an accident. Minor students shall have, for the purpose of this subdivision, the same power to contract, make elections of remedy, make settlements and receive compensation as adults would have subject to the power of the board of adjustment in its discretion at any time to require the appointment of a guardian to receive moneys or awards and payments of awards made to such minor students or their guardian shall exclude any further compensation either to the minor students or to their parents for loss of service or otherwise.

(b) The jurisdiction of the board of adjustment is specifically limited to the consideration of the claims enumerated in subsection (a) of this section and no others; provided, that nothing contained in this article shall confer upon the board of adjustment any jurisdiction now conferred by law upon the state board of compromise provided for in sections 41-1-3 and 41-1-4, and nothing contained in this article shall be construed to

confer jurisdiction upon the board of adjustment to settle or adjust any matter or claim of which the courts of this state have or had jurisdiction; provided further, that the board of adjustment shall have no jurisdiction over claims growing out of forfeitures or of contracts with any state agency, commission, board, institution or department is made the final arbiter of any disagreement growing out of forfeitures or of contracts of said state agency, commission, board, institution or department, and, particularly, the board of adjustment shall have no jurisdiction of disagreements arising out of contracts entered into by the highway department.

(c) Employees of municipalities and counties are not to be considered employees of the state of Alabama or of any of its agencies, commissions, boards, institutions or departments within the jurisdiction of this board and within the meaning of the word "employee" as used in this section. (Acts 1935, No. 546, p. 1164; Acts 1936-37, Ex. Sess., No. 173, p. 205; Code 1940, T. 55, § 334; Acts 1953, No. 540, p. 755.)

CERTIFICATE OF SERVICE

I, Joseph G. L. Marston, III, an Assistant Attorney General of Alabama, a member of the Bar of the Supreme Court of the United States and one of the Attorneys for the State of Alabama, Petitioner, do hereby certify that on this _____ day of _____, 1982, I did serve the requisite number of copies of the foregoing on the Attorney for Lula Mae McCurley, Respondent, by mailing the same to him, first class postage prepaid and addressed as follows:

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